

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant KENNETH R. SHEELY
United States Army, Appellant

ARMY 20130556

Headquarters, Fort Belvoir
James W. Herring, Jr., Military Judge
Lieutenant Colonel Margaret F. Thomas, Acting Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Vincent T. Shuler, JA; Captain Patrick A. Crocker, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major John Choike, JA; Captain Timothy C. Erickson, JA (on brief).

6 April 2015

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of sexual abuse of a child and one specification of wrongful possession, receipt and viewing of child pornography in violation of Articles 120b and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 920b, 934 (2012). Appellant was sentenced to a dishonorable discharge, 5 years confinement and reduction to E-1. In accordance with a pretrial agreement, the convening authority approved only 54 months confinement but approved the remainder of the sentence.

This case is before the court for review under Article 66, UCMJ. Appellant assigns one error asserting that his plea to the child pornography charge was improvident and raises additional matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The error assigned warrants brief discussion and partial relief.

Appellant claims that 6 of the 30 images charged as child pornography are not child pornography under the law and facts and requests this court therefore amend the specification accordingly and reassess the sentence.

We agree with appellant only insofar as it relates to image reference number 9 (.thumbdata3—1967290299_embedded_466.jpg). Appellant pled guilty to this image on the grounds that it contains a lascivious exhibition of the genitals or pubic area. It does not. *See United States v. Blouin*, 73 M.J. 694, 697 (Army Ct. Crim. App. 2014), review granted __ M.J. __ (C.A.A.F. Oct. 23, 2014); *United States v. Piolunek*, __ M.J. __ (C.A.A.F. Mar. 26, 2015).

CONCLUSION

After review of the entire record, including the parties' pleadings and the matters raised by appellant pursuant to *Grostepon*, we approve only so much of the finding of guilty to The Additional Charge and its Specification^{*} as follows:

In that Sergeant Kenneth R. Sheely, U.S. Army, did, at or near Fort George G. Meade, Maryland, between on or about 22 March 2012 and on or about 12 February 2013, knowingly and wrongfully possess, receive, and view child pornography, to wit: twenty-nine digital images on a Motorola cellular phone of minors or what appears to be minors, the file name for each image listed on Attachment "A" hereto, engaging in sexually explicit conduct, and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the error noted, the remaining findings of guilty, and the record as a whole, the sentence is AFFIRMED. *See United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013); *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court

^{*} We recognize that the phrase "or what appears to be minors" is merely surplusage under the circumstances of this case and has no effect on the findings or sentence. *See Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 64b.f.; *see also United States v. Finch*, 73 M.J. 144 (C.A.A.F. 2014).